

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA PLUMBING BOARD

In the Matter of the Adoption of Rules Adopting
Plumber Licensing, Certifications, Registration,
and Continuing Education

**ORDER ON REVIEW
OF RULES UNDER
MINN. STAT. § 14.26
AND MINN. R. 1400.2300**

This matter came before Administrative Law Judge Beverly Jones Heydinger upon the application of the Minnesota Plumbing Board (the Board).

On April 5, 2012, the Board filed documents with the Office of Administrative Hearings seeking review and approval of the above-entitled rules under Minn. Stat. § 14.26 and Minn. R. 1400.2300.

Based upon a review of the written submissions by the Board, and all of the documents in the rulemaking record,

IT IS HEREBY ORDERED THAT:

1. The Board has the statutory authority to adopt the rules.
2. The rules were adopted in compliance with the procedural requirements of Minnesota Statutes, Chapter 14, and Minnesota Rules, Chapter 1400.
3. The rules as adopted have been modified from the rules that were proposed, but are not substantially different, as determined pursuant to Minn. Stat. § 14.05, subd. 2.
4. The rules are approved, except as specified below.
5. The following rule parts are defective for the reasons set forth in the attached Memorandum, which includes recommendations to overcome the defects: Minnesota Rules pts. 4716.0200, subp. 2; 4716.0205, subp. 1A, and 4716.0210, subp. 1.

6. Pursuant to Minn. Stat. § 14.26, subd. 3 (b), and Minn. R. 1400.2300, subp. 6, these rules will be submitted to the Chief Administrative Law Judge for review.

Dated: April 19th, 2012

s/Beverly Jones Heydinger

BEVERLY JONES HEYDINGER
Administrative Law Judge

MEMORANDUM

Portions of the Rules Are Disapproved

Minnesota Rules 4716.0200, subp. 2, Minn. R. 4716.0205, subp. 1A, and Minn. R. 4716.0210, subp. 1.

These items address approval for continuing education programs but do not clearly define the terms that will be applied to determine what programs will be approved for credit. Because the items are incapable of application as written, they are impermissibly vague.

The definition of “continuing education program” includes “where interactive instruction is provided by one or more instructors, either directly or by interactive media.” The reference to “directly” in this definition apparently means “in person,” but it is not clear since interactive instruction may also be “direct.” Also, Minn. R. 4716.0205, subp. 1 A, states: “Continuing education hours obtained by electronic media must not exceed four hours during the renewal period.” Interpretation of this provision is confused by Minn. R. 4716.0210, subp. 1, which states:

An interactive educational program may also be approved for presentation through electronic media. In addition to the requirements of part 4716.0205, a program presented through electronic media that does not include real-time interaction between the presenter and the licensee or registrant must include an examination process that ensures a licensee or registrant has successfully completed the program.

The Board’s intent seems to be that an education program may be delivered on site or by electronic media. If it is delivered by electronic media, it must be either interactive (that is, the speaker and student must be in direct visual contact, such as by video conference), or, if not, an examination must be included.

To straighten out the confusion, the definition of “continuing education program” should be shortened to read: “Continuing education program means a course seminar, workshop, or other education offering approved by the department.” Minnesota Rule 4716.0210, subp. 1, clarifies the distinction between programs offered through electronic media that are interactive and those that are not.

The Board’s intent in Minn. R. 4716.0205, subp. 1, should be clarified. Does it intend to limit all credits obtained by electronic media to four hours, or only those credits that do not include real-time interaction between the presenter and licensee or registrant?

The language of Minn. R. 4716.0201, subp. 1, is confusing in another way. It states that to be approved, a program presented through electronic media that does not include real-time interaction must **also** meet the requirements of part 4716.0205. This reference is unclear because part 4716.0205 does not set forth course requirements or the range of acceptable subject matter. Rather, it sets out the individuals who must get continuing education, some of the required topics, and limitations.

If the intent of the limitation in Minn. R. 4716.0201, subp. 1, related to electronic media, is to assure that all approved education programs cover one of the required topics, it does not state that, nor is it clear why that requirement is more relevant to courses taught by electronic media than other courses. There is no clear statement in subpart 1 that approved courses must address specified topics, such as the Plumbing Code, water conditioning installation and servicing, or medical gas system installation, repair, or maintenance. Subpart 1 should be rewritten to reflect the scope of acceptable coursework. If some flexibility is desirable, it could include language allowing approval of other courses that the department determines are relevant to plumbing.

Modifications by the Board That Do Not Constitute Substantial Change

A. Changes Made Following Publication And Prior to Submission to the ALJ

There were changes made to the proposed rules by the Board following publication of the Notice of Intent to Adopt Rules in the State Register on December 27, 2011, and submission of the proposed adopted rule to the ALJ.

Minnesota Rule 4716.0070 – a change to the cited rule to correct a typographical error.

Minnesota Rule 4716.0092, subd. 2 – definition of a water conditioning master.

This definition was modified, apparently at the Board's own initiation, to allow experience as a licensed water conditioning journeyman.

Minnesota Rule 4716.0092, subp. 4 C – changes to hours of required experience.

The Board received comments from the Minnesota Water Quality Association suggesting reduced hours for specific types of experience in this rule subpart, and the Board adopted the recommendations.¹

Each of these modifications is within the scope of the rules as published in the Notice of Intent to Adopt Rules and none of them constitute a substantial change.

B. Changes Made Following Submission to the ALJ

Following submission to the ALJ and discussion about possible defects, the Board submitted some additional modifications.

Minnesota Rules 4716.0071, subps. 3 and 6.

Subpart three refers to ASSE Standard 6010 Medical Gas Systems Installers and subpart 6 refers to ANSI/ISO/IED Standard 17024 Conformity Assessment. Minnesota Statute § 14.07, subd. 4, requires that an agency include certain information and obtain the approval of the revisor of statutes if it incorporates other publications and documents by reference.

In order to incorporate material by reference, the rule must include the information required by statute: title, author, publisher, date of publication of the standard or material to be incorporated, and must state whether the material is subject to frequent change and its availability. There are abbreviations in the rule that are not clearly defined. To address these possible defects, the Board submitted the following modification, adding a provision to include the required information.

4716.0015 Standard Adopted by Reference.

The following are incorporated by reference, are not subject to frequent change, and are made part of this chapter:

- A. ASSE Standard 6010 Medical Gas Systems Installers, published by the American Society of Sanitary Engineering, 901 Canterbury Road, Suite A, Westlake, Ohio 44145-1480. ASSE Standard 6010 is copyright 2006 by the American Society of Sanitary Engineering;

¹ Ex. J.

- B. ANSO/ISO/IEC Standard 17024 Conformity assessment – general requirement for bodies operating certification of persons, published by the American National Standards Institute, 10 East 40th Street, New York, New York, 10016; International Organization for Standardization, 1, ch. De la Voie-Creuse, CP 56, CH-1211 Geneva 20, Switzerland; and International Electrotechnical Commission, 3, rue de Varembe, P.O. Box 131, CH-1211 Geneva 20, Switzerland. ANSI/ISO/IE Standard 17024 is copyright 2003 by the American National Standards Institute.

These are available in the office of the commissioner of labor and industry.

This change is consistent with the statutory requirement for incorporation by reference, clarifies the references in the proposed rules and does not substantially change the rules as proposed. This change may be included in the order adopting the rules following approval by the revisor of statutes.

Minnesota Rules 4716.0092, subp. 5 B.

This item as drafted was impermissibly vague. It stated that a written examination for the licensing of water conditioning contractors and installers shall be given at least once per year, but it was not clear who had the obligation to give the exam, nor is there a provision of statute that addresses the question. The SONAR states that applicants are required to pass an examination given by the commissioner. In order to correct this defect, the Board proposed that this item should be rewritten to state:

The commissioner shall give a written examination for the licensing of water conditioning contractors and installers at least once a year.

This modification clarifies where the duty lies and does not substantially change the rules as proposed since licensed individuals are aware that the commissioner administers the required tests.

Minnesota Rule 4716.0200, subp. 5.

This subpart includes the definition of “restricted plumber.” As originally submitted, it included an incorrect statutory citation. The Board subsequently proposed replacing the incorrect reference to Minn. Stat. § 326B.55, subd. 1, with the correct reference to Minn. Stat. § 326B.475.

This substitution corrected the citation to reference the specific statute addressing “restricted plumber.” It does not substantially change the rule as proposed.

Recommended Technical Corrections

The following changes are recommended to assure that the rule is clearly written and accurately reflects the Board’s intent. The changes are within the scope of the Notice of Intent to Adopt Rules, would assist the understanding and application of the rule and, if the Board chooses to make the changes, would not constitute substantial changes.

Minnesota Rules 4716.0072, subp. 2 A (1)

This item states “current certification as a certified installer as defined in part 4716.0071, subpart 5, that was obtained on or before August 1, 2010.”

It is apparent that this was intended to exempt certain individuals from licensure, but as written, it is less clear than the related statutory language, which states: “An individual who on August 1, 2010, possesses a valid certificate meeting the requirements of the [ASSE] Standard 6010 and is a qualified brazer... is exempt from the licensing requirements of subdivision 2....”.

In the future, an individual may have a certificate that was renewed after August 1, 2010. That person should be exempt under the statute, but would not appear to be exempt under the rule. In order to clear up this potential inconsistency, it is recommended that the Board revise the language of the rule as follows:

- (1) A certified installer as defined in part 4716.0071, subpart 5, who was certified on or before August 1, 2010; or

Minnesota Rules 4716.0092, subp. 1

Line 4.18: delete “they have” and replace with “it has,” in reference to the water conditioning contractor.

Minnesota Rules 4716.0090, subp. 4 A

The sentence beginning on line 6.1 would be clearer if the word “while” were placed immediately before “in the armed forces,” as follows: (4) experience performing the practical installation and servicing of water conditioning systems while in the armed forces of the United States,...

Line 6.2 refers to the “armed forces” and line 6.5 refers to the “military.” It would be preferable to use one term consistently unless there is an intended distinction between the two terms.

Minnesota Rules 4716.0092, subp. 4 C

A sentence in both C (1) and C (2) states: “The maximum allowable experience shall be zero hours before the age of 17.” According to the SONAR, the intent of this sentence is to set a minimum age for accumulating the required experience. As written, this meaning is not clear. A clearer alternative would be:

An applicant may not include any hours of experience obtained prior to attaining the age of 17.

Also, it would be clearer to exchange the order of this sentence and the one that follows it, since the age restriction applies to all of the required hours.

Minn. R. 4716.0205, subp. 1 A and B.

These subparts state that “(t)he following license types are required to obtain [specified hours] of continuing education instruction....” “License types” are not subject to the requirements; individuals who hold licenses are responsible for obtaining the required hours. To correct this, the sentence in both item A and item B would be clearer if modified to read: (i)ndividuals who hold the following licenses are required to obtain [specified hours] of continuing education instruction...”

Minn. R. 4716.0205, subp. 2 A.

Because the term “continuing education program” is defined, the reference in the first sentence to “credit for the required hours of instruction through one or more continuing education programs as required by this part” is confusing. It would be clarified by replacing the quoted language with “the required number of credits of approved continuing education.”

The second sentence is also confusing. It states “[c]ontinuing education hours of instruction obtained shall not be transferred and may not be used for more than one renewal period.” This apparently means that the individual who took the instruction may not transfer the hours to another individual, but its placement with language about the renewal period implies that one course could not be transferred to another renewal period. \

To clarify this, it would be preferable to divide the sentences. The first could state that no individual may transfer continuing education hours of instruction to another individual. The second sentence could state that hours

may only be applied to the renewal period in which they are obtained and may not be carried over to the next renewal period.

Minnesota Rule 4716.0205, subp. 2 B.

This item allows hours of instruction to be applied to each license, registration, or certification during the renewal period. It is not clear, although it is apparently intended, that this provision does not excuse compliance with the specific requirements for each license, registration or certification. In order to make this clear, it would be useful to add the following qualifying phrase at the end of the sentence: “so long as the specific requirements for the license, registration or certification are met.”

B.J.H.